

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FILED

JUN - 3 2010

CLERK, U.S. DISTRICT COURT

By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT ALLEN BYRD,

Petitioner,

v.

RICK THALER, Director,
Texas Department of Criminal
Justice, Correctional
Institutions Division,

Respondent.

2025 2024 2023 2022 2021 2020 2019 2018 2017 2016 2015 2014 2013 2012 2011 2010 2009 2008 2007 2006 2005 2004 2003 2002 2001 2000 1999 1998 1997 1996 1995 1994 1993 1992 1991 1990 1989 1988 1987 1986 1985 1984 1983 1982 1981 1980 1979 1978 1977 1976 1975 1974 1973 1972 1971 1970 1969 1968 1967 1966 1965 1964 1963 1962 1961 1960 1959 1958 1957 1956 1955 1954 1953 1952 1951 1950 1949 1948 1947 1946 1945 1944 1943 1942 1941 1940 1939 1938 1937 1936 1935 1934 1933 1932 1931 1930 1929 1928 1927 1926 1925 1924 1923 1922 1921 1920 1919 1918 1917 1916 1915 1914 1913 1912 1911 1910 1909 1908 1907 1906 1905 1904 1903 1902 1901 1900 1899 1898 1897 1896 1895 1894 1893 1892 1891 1890 1889 1888 1887 1886 1885 1884 1883 1882 1881 1880 1879 1878 1877 1876 1875 1874 1873 1872 1871 1870 1869 1868 1867 1866 1865 1864 1863 1862 1861 1860 1859 1858 1857 1856 1855 1854 1853 1852 1851 1850 1849 1848 1847 1846 1845 1844 1843 1842 1841 1840 1839 1838 1837 1836 1835 1834 1833 1832 1831 1830 1829 1828 1827 1826 1825 1824 1823 1822 1821 1820 1819 1818 1817 1816 1815 1814 1813 1812 1811 1810 1809 1808 1807 1806 1805 1804 1803 1802 1801 1800 1799 1798 1797 1796 1795 1794 1793 1792 1791 1790 1789 1788 1787 1786 1785 1784 1783 1782 1781 1780 1779 1778 1777 1776 1775 1774 1773 1772 1771 1770 1769 1768 1767 1766 1765 1764 1763 1762 1761 1760 1759 1758 1757 1756 1755 1754 1753 1752 1751 1750 1749 1748 1747 1746 1745 1744 1743 1742 1741 1740 1739 1738 1737 1736 1735 1734 1733 1732 1731 1730 1729 1728 1727 1726 1725 1724 1723 1722 1721 1720 1719 1718 1717 1716 1715 1714 1713 1712 1711 1710 1709 1708 1707 1706 1705 1704 1703 1702 1701 1700 1699 1698 1697 1696 1695 1694 1693 1692 1691 1690 1689 1688 1687 1686 1685 1684 1683 1682 1681 1680 1679 1678 1677 1676 1675 1674 1673 1672 1671 1670 1669 1668 1667 1666 1665 1664 1663 1662 1661 1660 1659 1658 1657 1656 1655 1654 1653 1652 1651 1650 1649 1648 1647 1646 1645 1644 1643 1642 1641 1640 1639 1638 1637 1636 1635 1634 1633 1632 1631 1630 1629 1628 1627 1626 1625 1624 1623 1622 1621 1620 1619 1618 1617 1616 1615 1614 1613 1612 1611 1610 1609 1608 1607 1606 1605 1604 1603 1602 1601 1600 1599 1598 1597 1596 1595 1594 1593 1592 1591 1590 1589 1588 1587 1586 1585 1584 1583 1582 1581 1580 1579 1578 1577 1576 1575 1574 1573 1572 1571 1570 1569 1568 1567 1566 1565 1564 1563 1562 1561 1560 1559 1558 1557 1556 1555 1554 1553 1552 1551 1550 1549 1548 1547 1546 1545 1544 1543 1542 1541 1540 1539 1538 1537 1536 1535 1534 1533 1532 1531 1530 1529 1528 1527 1526 1525 1524 1523 1522 1521 1520 1519 1518 1517 1516 1515 1514 1513 1512 1511 1510 1509 1508 1507 1506 1505 1504 1503 1502 1501 1500 1499 1498 1497 1496 1495 1494 1493 1492 1491 1490 1489 1488 1487 1486 1485 1484 1483 1482 1481 1480 1479 1478 1477 1476 1475 1474 1473 1472 1471 1470 1469 1468 1467 1466 1465 1464 1463 1462 1461 1460 1459 1458 1457 1456 1455 1454 1453 1452 1451 1450 1449 1448 1447 1446 1445 1444 1443 1442 1441 1440 1439 1438 1437 1436 1435 1434 1433 1432 1431 1430 1429 1428 1427 1426 1425 1424 1423 1422 1421 1420 1419 1418 1417 1416 1415 1414 1413 1412 1411 1410 1409 1408 1407 1406 1405 1404 1403 1402 1401 1400 1399 1398 1397 1396 1395 1394 1393 1392 1391 1390 1389 1388 1387 1386 1385 1384 1383 1382 1381 1380 1379 1378 1377 1376 1375 1374 1373 1372 1371 1370 1369 1368 1367 1366 1365 1364 1363 1362 1361 1360 1359 1358 1357 1356 1355 1354 1353 1352 1351 1350 1349 1348 1347 1346 1345 1344 1343 1342 1341 1340 1339 1338 1337 1336 1335 1334 1333 1332 1331 1330 1329 1328 1327 1326 1325 1324 1323 1322 1321 1320 1319 1318 1317 1316 1315 1314 1313 1312 1311 1310 1309 1308 1307 1306 1305 1304 1303 1302 1301 1300 1299 1298 1297 1296 1295 1294 1293 1292 1291 1290 1289 1288 1287 1286 1285 1284 1283 1282 1281 1280 1279 1278 1277 1276 1275 1274 1273 1272 1271 1270 1269 1268 1267 1266 1265 1264 1263 1262 1261 1260 1259 1258 1257 1256 1255 1254 1253 1252 1251 1250 1249 1248 1247 1246 1245 1244 1243 1242 1241 1240 1239 1238 1237 1236 1235 1234 1233 1232 1231 1230 1229 1228 1227 1226 1225 1224 1223 1222 1221 1220 1219 1218 1217 1216 1215 1214 1213 1212 1211 1210 1209 1208 1

No. 4:10-CV-021-A

MEMORANDUM OPINION

and

ORDER

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by petitioner, Robert Allen Byrd, a state prisoner currently incarcerated in Huntsville, Texas, against Rick Thaler, Director of the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ), respondent. After having considered the pleadings, state court records, and relief sought by petitioner, the court has concluded that the petition should be dismissed on exhaustion grounds.

I. FACTUAL AND PROCEDURAL HISTORY

The state court records and documentary evidence presented by the parties reflect that petitioner is serving a 99-year sentence for his 2008 conviction for engaging in organized criminal activity

in the 355th Judicial District Court of Hood County, Texas. ¹
(Clerk's R. at 46) Petitioner appealed his conviction, but the Second Court of Appeals of Texas affirmed the trial court's judgment on March 12, 2009. *Byrd v. State*, No. 2-08-124-CR, slip op. (Tex. App.-Fort Worth Mar. 12, 2009) (not designated for publication). Petitioner filed a petition for discretionary review in the Texas Court of Criminal Appeals, which was dismissed as untimely on August 19, 2009. *Byrd v. State*, PDR No. 991-09. Petitioner did not seek state postconviction habeas review.

The state court of appeals summarized the evidence at trial as follows:

Appellant, a resident of Johnson County, is a confessed former high ranking captain of a white-supremacist group who call themselves the Aryan Circle. In May 2006, Appellant had gone to Hood County, Texas, to "hold court"³ on a fellow Aryan Circle member, Shawn Goodrich. The court involved allegations surrounding Goodrich's extensive use of methamphetamine and Goodrich being behind on his payments for the illegal drug.

FN3. "Holding court" refers to fellow Aryan Circle members hold another member accountable for violating the Aryan Circle's "handbook" and often involves physical punishment for the offender.

After having conducted court regarding Goodrich,

¹Petitioner is also serving a life sentence for his 2008 capital murder conviction in McClennan County, Texas.

Appellant, Johnny Freeman, Daniel Roof – a lieutenant in the Aryan Circle, Jennifer Perez, and Goodrich went to a Granbury convenience store to meet Ruth Adkins and her son James Newell. Adkins was upset that her daughter, Jennifer Newell, had begun shooting methamphetamine with her boyfriend, James Padgett. Adkins believed that Padgett would get her daughter to use the drug so that she would pass out and he would then do "sexual things" with her.

Shortly after this meeting, Appellant, Freeman, Roof, Goodrich, and Perez drove to Oak Trail Shores, a Granbury subdivision. On the way, Appellant talked about going to Jennifer Newell and Padgett's house because Padgett was "spinning Jennifer out."⁴ When the group got to Padgett's house, Jennifer answered the door and told them that Padgett was not home, so the group left. On their way out of the Oak Trail Shores neighborhood, they saw Padgett entering the gates and turned around. After stopping Padgett's vehicle, Appellant, Roof, and Freeman jumped out of the truck. Appellant and Roof allegedly had knives with them. About five minutes later, the three returned to the truck with blood on them and breathing heavily. As they left the scene, Appellant used a stuffed animal in the truck to wipe the blood off his arm and knife. Roof cleaned his knife with beer. They then threw the bloodied toy, as well as the knives, out of the truck window.

FN4. "Spinning out" is vernacular used to describe the state of being high on methamphetamine to the point of unconsciousness.

As they left the scene, Freeman was allegedly upset, saying that what had occurred "was sloppy" and that the attack "wasn't suppose[d] to go down like that." Appellant replied, "It's all right. I got him. We don't have nothing to worry about." Roof complained that he was able to "do nothing" because his knife was dull. The group then drove to Dallas, where they purchased new clothes at a Wal-Mart. The three men changed their clothes at a truck stop and discarded their bloody

clothes into the truck stop's trash bin.

Freeman's girlfriend, Amber, returned home late that afternoon and found that Freeman was not home. She called several people, including Adkins, looking for Freeman. Adkins told Amber that there had been a stabbing in Oak Trail Shores and that the police thought Freeman was involved. Shortly thereafter, Adkins called Amber and asked her to meet her at Brazos River Acres. Once there, Adkins told Amber that Freeman wanted to meet them in Hillsboro, Texas.

Adkins and Amber drove to Hillsboro, where they met Appellant and Freeman at a gas station. Amber noticed that the men were wearing different clothes than they had been wearing earlier. Adkins rented a nearby motel room, where the four of them went to talk.

At trial, Amber testified that Appellant said he had stabbed Padgett because God told him to and that he was freeing Jennifer Newell from Padgett. Appellant described how it "felt good" to stab Padgett. According to Amber, Freeman appeared shocked while Appellant and Adkins appeared pleased.

Padgett was airlifted to Harris Methodist Hospital in Fort Worth after the stabbing. Having suffered massive blood loss, he underwent surgery to repair multiple stab wounds in his heart and his torso. He was eventually transferred to a nursing home facility, where he died of pneumonia nearly a year later. The medical examiner listed Padgett's cause of death as complications from multiple stab wounds.

Byrd, No. 2-08-124-CR, slip copy, at 2-5.

II. ISSUES

In four grounds, petitioner raises the following claims:

- (1) He was denied his right to appeal.
- (2) The evidence is legally insufficient to support his

conviction.

- (3) Illegally seized evidence was admitted at trial; and
- (4) He received ineffective assistance of counsel on appeal.
(Petition at 7-8; Pet'r Memo. at)

III. RULE 5 STATEMENT

Respondent maintains that petitioner's claims have not been properly exhausted in the state courts as required by 28 U.S.C. § 2254(b) and (c), and he moves for dismissal of the petition on exhaustion grounds or, in the alternative, denied on the merits.
(Resp't Ans. at 5-10)

IV. EXHAUSTION OF REMEDIES IN STATE COURT

Applicants seeking habeas corpus relief under § 2254 are required to exhaust all claims in state court before requesting federal collateral relief. *Fisher v. Texas*, 169 F.3d 295, 302 (5th Cir. 1999). 28 U.S.C. § 2254(b) and (c) provide in pertinent part:

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that

—

(A) the applicant has exhausted the remedies available in the courts of the State;
or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(c) An applicant shall not be deemed to

have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(b)(1), (c).

A Texas prisoner may satisfy the exhaustion requirement by presenting both the factual and legal substance of his claims to the Texas Court of Criminal Appeals in either a petition for discretionary review or a state habeas corpus proceeding pursuant to article 11.07 of the Texas Code of Criminal Procedure. See TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 2005); *Alexander v. Johnson*, 163 F.3d 906, 908-09 (5th Cir. 1998); *Bd. of Pardons & Paroles v. Court of Appeals for the Eighth Dist.*, 910 S.W.2d 481, 484 (Tex. Crim. App. 1995). This requires that the state court be given a fair opportunity to pass on the claims, which in turn requires that the applicant present his claims in a procedurally proper manner according to the rules of the state courts. See *Depuy v. Butler*, 837 F.2d 699, 702 (5th Cir. 1988).

Unquestionably, petitioner has failed to exhaust his state court remedies in a procedurally correct manner with respect to the claims presented by raising the claims in a timely filed petition for discretionary review or a state habeas application under article 11.07. Consequently, the state's highest court has not

been afforded a fair opportunity to consider the merits of petitioner's claims, and the claims are unexhausted for purposes of federal habeas review. Absent a showing that state remedies are inadequate, such showing not having been demonstrated by petitioner, he cannot now proceed in federal court in habeas corpus. See 28 U.S.C. §2254; *Fuller v. Florida*, 473 F.2d 1383, 1384 (5th Cir. 1973); *Frazier v. Jones*, 466 F.2d 505, 506 (5th Cir. 1972). Petitioner maintains the right to pursue state corrective process via a state habeas application requesting permission to file an out-of-time petition for discretionary review or a state habeas application raising the claims presented.

Petitioner seeks a "stay and abeyance" of the action so that he may return to state court for purposes of exhausting his claims. A dismissal of this action could result in a subsequent habeas petition being barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d). In light of this dilemma, federal courts have the authority to stay a habeas petition and hold it in abeyance while a petitioner exhausts his claims in state court. See *Rhines v. Weber*, 544 U.S. 269, 276-77 (2005). Such stays, however, are available only under limited circumstances. *Id.* at 277. Stay and abeyance is only appropriate when three requirements are met: (1) there is good cause for the petitioner's failure to exhaust his

claims first in state court; (2) the unexhausted claims are not plainly meritless; and, (3) there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. *Id.* at 277-78.

Petitioner claims he was ignorant of filing deadlines and forced to represent himself after his conviction was affirmed by the state court of appeals. (Pet'r Mtn. to Stay at 1) He further claims he did not file a state habeas application because the Texas Court of Criminal Appeals conspired against him by illegally dismissing his petition for discretionary review as untimely. (Pet'r Rebuttal at 2) Neither pro se status nor ignorance of the law and filing deadlines constitutes good cause for petitioner's failure to exhaust his state remedies. See *Taylor v. Sherry*, No. 07-CV-14298, 2009 WL 596241 at *2 n.3 (E.D.Mich. Mar.9, 2009), citing *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir.), cert. denied, 543 U.S. 989 (2004) (pro se status does not constitute "good cause" for failure to exhaust state remedies and, therefore, does not justify stay-and-abeyance procedure); *Josselyn v. Dennehy*, 475 F.3d 1, 5 (1st Cir. 2007) (same as to ignorance of the law). Further, petitioner's claim that the Texas Court of Criminal Appeals conspired to illegally dismiss his petition for discretionary review lacks any factual basis whatsoever and is

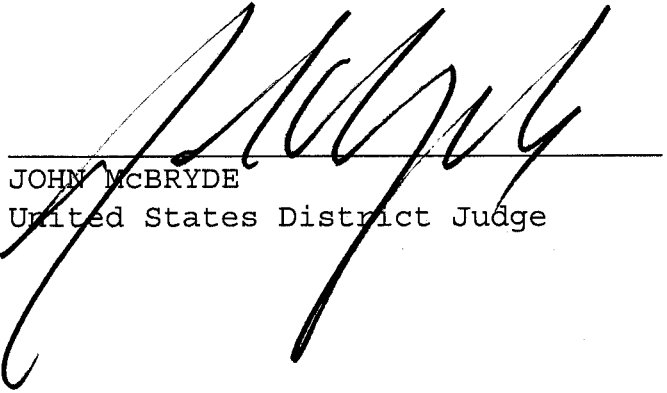
legally incorrect. Petitioner has not demonstrated good cause for his failure to exhaust his claims in state court, thus it is unnecessary to address the remaining two *Rhines* factors.

For the reasons discussed herein,

The court ORDERS the petition of petitioner for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be, and is hereby, dismissed without prejudice on exhaustion grounds.

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Court, and 28 U.S.C. § 2253(c), for the reasons discussed herein, the court further ORDERS that a certificate of appealability be, and is hereby, denied, as petitioner has not made a substantial showing of the denial of a constitutional right.

SIGNED June 3, 2010.



JOHN MCBRYDE
United States District Judge